

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC.,	:	
	:	
Plaintiff,	:	
v.	:	Civil Action
	:	No. 3:09CV620
LAWSON SOFTWARE, INC.,	:	
	:	
Defendant.	:	January 25, 2011

COMPLETE TRANSCRIPT OF **JURY TRIAL**
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

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1 (The proceedings in this matter commenced at
2 9:09 a.m.)
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4 THE CLERK: Civil Action No. 3:09CV00620,
5 *ePlus, Incorporated v. Lawson Software, Incorporated.*
6 Mr. Scott L. Robertson, Mr. Craig T. Merritt, and
7 Mr. Michael T. Strapp represent the plaintiff.
8 Mr. Dabney J. Carr, IV represents the defendant.

9 Are counsel ready to proceed?

10 MR. ROBERTSON: Yes, Your Honor.

11 MR. McDONALD: Yes, Your Honor.

12 THE COURT: Good morning, ladies and
13 gentlemen. The record reflects that all the jurors
14 are here assembled and they will return to their
15 deliberations.

16 Mr. Neal, have you given them menus?

17 THE CLERK: Yes, sir, they've completed them.

18 THE COURT: All right. Thank you very much.

19 And we'll see you when you have a verdict.
20 Thank you.

21 (The jury resumes deliberation at 9:11 a.m.)

22 THE COURT: All right. We have this question
23 about the offer of proof now that the briefs are in.
24 Can I just decide that on the papers or does anybody
25 want argument on it?

1 MR. MERRITT: Your Honor, we're happy to have
2 it decided on the papers. I think we've spilled about
3 all the ink over it that can be spilled.

4 MR. McDONALD: That's fine with Lawson, Your
5 Honor.

6 THE COURT: All right. I'll just decide it
7 on the papers. And then you-all need to talk about a
8 briefing schedule on that. There were two motions
9 that were filed yesterday.

10 MR. ROBERTSON: JMOL, no invalidity, Your
11 Honor, and there's a Rule 37 motion filed by Lawson.

12 MR. CARR: Yes, the Rule 37 motion has to do
13 with the Section 103(c)(1) issue. We can work
14 something out.

15 THE COURT: And you have a motion for what?

16 MR. ROBERTSON: JMOL, no invalidity.

17 THE COURT: No invalidity.

18 MR. CARR: And we need to set a schedule for
19 us to respond to that.

20 THE COURT: All right. You all do that and
21 I'd like to go on and get this stuff done while it's
22 relatively fresh in my mind, if you don't mind. So if
23 you could get an expedited, not an expedited, but a
24 schedule that's not a leisurely one, I would
25 appreciate it.

1 MR. ROBERTSON: Sure.

2 THE COURT: All right. Thank you very much.

3 MR. ROBERTSON: Thank you.

4 THE COURT: Not all of you have to wait here
5 all the time.

6 MR. ROBERTSON: Your Honor, I think we've
7 worked it without Mr. Neal.

8 Mr. Neal, do you know when their lunch period
9 is?

10 THE COURT: Generally, what time does lunch
11 come?

12 THE CLERK: Between 12:30 and 1:00.

13 MR. ROBERTSON: We'll check in with Mr. Neal.
14 He has our phone numbers, and we'll have somebody in
15 the conference room at all times.

16 THE CLERK: I'm come find you. You don't
17 have to check back.

18 THE COURT: I've think it's better for you
19 just to call and tell them when the lunch period is.

20 MR. CARR: That sounds fine.

21 THE COURT: All right. Thank you.

22 MR. ROBERTSON: Thank you, Judge.

23 (Recess taken.)

24 (Court resumes session. The jury is not
25 present.)

1 THE COURT: All right. In Section II,
2 validity, (A) what are we supposed to use to define
3 "Fisher RIMS" in A?

4 Next question: Since J-CON and P.O. Writer
5 aren't listed on our verdict sheet, are we to consider
6 them as prior art? Isn't that what they were included
7 in the case for?

8 Next question: Was P.O. Writer meant to be
9 considered as a competing, similar system or was that
10 evidence not to be included in deliberations?

11 Next question: In jury instruction, Judge
12 Payne spoke of anticipation. Two items combined are
13 not prior art. So anticipation does not apply
14 anymore; is that correct?

15 Let's take the easy ones first at the back.
16 I propose to call them back in here and refer them to
17 the anticipation instructions and to remind them that
18 you can't combine two pieces of prior art for purposes
19 of anticipation, that it all has to be -- that you
20 have to consider whether there's anything in one
21 single prior reference, prior art reference. And
22 anticipation is in the case but not in terms of the
23 combination, that the combination applies only to the
24 obviousness; is that right?

25 MR. ROBERTSON: I think, Your Honor, there

1 are two sentences from your instruction No. 31 that
2 would respond to this. And they are: To anticipate a
3 claim, each and every element in the claim must be
4 present in a single item of prior art. Anticipation
5 cannot be established by combining two or more items
6 of prior art.

7 MR. CARR: Your Honor, it occurs to me that
8 what they might be confused about is that there are
9 two references that are accused, that are offered to
10 be anticipatory, and I wondered if it might be helpful
11 to them to clarify to them because those are in the
12 instructions, those two references, and just to let
13 them know that they need to consider each separately.

14 I think that would be helpful to them to let
15 them know. I think where they may be confused is they
16 have been given two references for anticipation and
17 they may be thinking of them together.

18 THE COURT: That's possible.

19 MR. ROBERTSON: Your Honor, the verdict form
20 breaks those down separately. So the verdict form
21 takes care of that issue.

22 THE COURT: Well, nonetheless, anything that
23 will help them is fine.

24 All right. I think I know how to deal with
25 that one.

1 Now, on P.O. Writer, the bottom line is that
2 they are out of the case, isn't it? They are not to
3 be considered.

4 MR. CARR: No, Your Honor. P.O. Writer and
5 J-CON, if you will remember at the time of Dr. Shamos'
6 testimony, were being offered on the issue of
7 secondary considerations of non-obviousness on long
8 felt need. As systems that were in the marketplace at
9 the relevant time that were meeting the needs of the
10 marketplace. That was your ruling.

11 THE COURT: I think I allowed the evidence to
12 come in for that purpose because it occurred after the
13 combination. I don't think he testified about that.

14 MR. CARR: Your Honor, yes, he did testify
15 about both of those systems on that point.

16 THE COURT: What did he say?

17 MR. CARR: What I would suggestion here if
18 you said they were offered on that point is that you
19 can tell the jury that they are not being offered as
20 prior art for either anticipation or obviousness as
21 long as you tell them that they are offered on
22 secondary considerations of non-obviousness on the
23 long felt need and meeting the needs of the
24 marketplace point. That would be what I would
25 suggest.

1 MR. ROBERTSON: That's not the question they
2 asked, Your Honor. They're asking can it be
3 considered for purposes of prior art for this verdict
4 form. Isn't that what they are included in the case
5 for? That's what's now confusing. They were included
6 in the case. There was no argument made at the
7 closing argument that they were prior art. There was
8 no testimony --

9 THE COURT: Yes, Mr. McDonald started arguing
10 them as prior art, and I told him that he could not
11 argue them as prior art because they were not on the
12 list of prior art either for obviousness or
13 anticipation and he couldn't do that.

14 MR. McDONALD: But they are prior art for
15 purposes of secondary considerations of
16 non-obviousness. Prior art just means existed before
17 the patent.

18 THE COURT: I don't think that's a proper
19 term for that. I think it can be considered. The way
20 that evidence can be considered is whether those
21 systems which existed not as prior art but in the
22 commercial world demonstrated that there was no long
23 felt need, but I don't remember Dr. Shamos testifying
24 about that, and I don't remember anybody else
25 testifying about it.

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1 MR. CARR: Well, Your Honor, I would
2 disagree. I think tie records speaks for itself.

3 THE COURT: Well, I have to have the record.
4 Get the transcripts and show me where it is. That's
5 one of the reasons I don't think too much of these
6 people who tried the case being out of town when these
7 questions come in.

8 Do you know where it is, where he testified
9 about it, Mr. Robertson? Can you help me out? I know
10 it's not your ox that needs to be pulled out of the
11 ditch, but at least you're here.

12 MR. ROBERTSON: I have it in the other room,
13 Your Honor. I'll go check. I don't recall it. I
14 recall some testimony from Mr. Staats and the McEneny
15 deposition in which they said when they had the
16 system, at what point in time. I don't think it was
17 argued as a secondary fact, but I'd have to go check
18 that.

19 THE COURT: When Mr. McDonald was making his
20 argument, he made the point at some point, I think
21 maybe up at the side bar, that it was to be used for
22 long felt need, but he didn't ever -- he wasn't
23 arguing it as prior art. He was arguing it to show
24 long felt need, but he never made that argument that I
25 remember either.

1 MR. CARR: I think he felt that your ruling
2 precluded him from going any farther on J-CON or P.O.
3 Writer, so he needed to leave that alone.

4 THE COURT: My ruling was you're arguing it
5 for prior art. You can't do that. That's what I
6 ruled.

7 MR. ROBERTSON: Your Honor --

8 THE COURT: I remember very well what
9 happened. And if he wasn't picking up on what the
10 drill is on the distinction he was making, that's, I
11 think, his problem, not something I created.

12 MR. ROBERTSON: And I don't want now an
13 argument to be made with respect to answering the
14 question as to what it should be applied to. The
15 question is very specific about the verdict form. And
16 the verdict form says what the prior art is they can
17 consider.

18 THE COURT: Well, I know what you want, but
19 also if the evidence is in the case, and it came in
20 for long felt need, and now the question is what do we
21 do with it, then it's in the case, and it seems to me
22 that he didn't argue it in his closing argument as
23 evidence of long felt need. It was there to be argued
24 for that purpose. There was no other reason to let it
25 in because I had already cut out the combination

1 issues, and if Dr. Shamos testified about it in some
2 way and established it in context of long felt need,
3 then I think I need to clarify for the jury that there
4 is something to that effect in the case
5 notwithstanding that it wasn't in the closing
6 arguments.

7 MR. ROBERTSON: We'll go check that, Your
8 Honor, but to the extent -- I mean, I think we should
9 clarify it so there's no confusion that it can't be
10 considered prior art for purposes of the verdict form.

11 THE COURT: There's no question about that.

12 MR. CARR: I don't have any problem with
13 doing that because it can't be considered for
14 anticipation or obviousness as prior art, but it can
15 be considered on secondary considerations. I think
16 that would help them the most.

17 MR. ROBERTSON: Let's go check the record,
18 Your Honor.

19 THE COURT: Yes. Now, what do I do with the
20 top problem?

21 MR. ROBERTSON: Well, this was exactly our
22 fear, Your Honor, that this unspecified, undefined
23 so-called Fisher RIMS system that they are struggling
24 with now because there's insufficient detail for it.

25 We have a suggestion. My preference,

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1 obviously, would be that it didn't go to the jury, but
2 we've crossed that Rubicon. So here would be my
3 suggestion. To define Fisher RIMS, you must first
4 determine that there was clear and convincing evidence
5 sufficient to describe the system and its features as
6 of the relevant dates.

7 MR. CARR: Your Honor, I think that is
8 argument. I think this is the kind of question that
9 the way it's appropriate to respond to it is that they
10 have to rely on the evidence that they heard from the
11 witnesses and through the documents. I don't think
12 you can go farther than that or say anything in
13 addition to what is already in the instructions.

14 THE COURT: Go look at that transcript.

15 MR. CARR: For Dr. Shamos?

16 THE COURT: I'll let them go.

17 MR. CARR: I think I'll need to look at it
18 with them, Your Honor. So I can agree on what it
19 says.

20 THE COURT: Of course, you will. You'll have
21 a chance to do that, but I'm trying to kill two birds
22 with one stone. Let them find where he's testifying
23 about it, and then you can double check. I'm not
24 trying in any way -- you see, basically, I thought
25 that the advantage of having this transcript was that

1 you all could plug in the magic twanger and say,
2 "Shamos, long felt need," and it would take you to
3 where he testified to that.

4 MR. CARR: I don't know that anybody has it
5 electronically here. We're just going to have to go
6 through the hard copy and look for when he talked
7 about P.O. Writer and J-CON and see what he said.

8 MR. ROBERTSON: I think it only applies to
9 P.O. Writer. There's only one question as to P.O.
10 Writer as a competing, similar system. The other ones
11 ask whether J-CON and P.O. Writer are prior art. And
12 the answer to that is no.

13 MR. CARR: I think, Your Honor, they're
14 related. It's clear that they are trying to figure
15 out what they can use J-CON and P.O. Writer for, and I
16 think the way to make sense and is fair to both sides
17 is simply to tell them that. And I'm not trying to
18 say that they should be told that they can be used as
19 prior art for anticipation or obviousness, but they
20 should be told what they can use them for, and that is
21 not unfair to ePlus.

22 MR. MERRITT: Your Honor, before coming to a
23 final decision on this use of J-CON and P.O. Writer --

24 THE COURT: Can you hold on for just one
25 minute?

1 MR. MERRITT: Yes. I'm sorry.

2 THE COURT: Just hold that thought and I'll
3 be with you.

4 As to the first question, I think I would
5 say, Lawson asserts that something called Fisher RIMS
6 system is prior art for purposes of anticipation and
7 obviousness. Lawson must prove that what it refers to
8 as Fisher RIMS is prior art by clear and convincing
9 evidence. EPlus argues that Lawson has not proved by
10 clear and convincing evidence that anything called
11 Fisher RIMS existed sufficiently to be prior art. You
12 must decide from the evidence whether Lawson has
13 proved by clear and convincing evidence that something
14 called Fisher RIMS is prior art for either purpose.
15 That anything called Fisher RIMS.

16 What do you think about that answer? Isn't
17 that really where we are?

18 MR. CARR: I think that's very
19 straightforward, Your Honor.

20 MR. ROBERTSON: One suggestion, Your Honor.

21 THE COURT: Sure.

22 MR. ROBERTSON: Was there something called
23 Fisher RIMS? I think the evidence would say there is
24 something called Fisher RIMS, but the question is:
25 What were its features at what relevant date? So I

1 think if the Court could just say what its features
2 were at the appropriate time.

3 MR. CARR: Your Honor, I think the way you
4 expressed it went far enough. And we're getting down
5 into the details, in the weeds, of what the evidence
6 was, and I just don't think that helps the jury to do
7 that.

8 Mr. Robertson, I think, is really getting
9 into argument, and that's where he would say what you
10 have done is fine.

11 MR. ROBERTSON: Your Honor, the devil is in
12 the details here. It has to have each and every
13 element of each and every claim. So what the features
14 are of this so-called Fisher RIMS system is what needs
15 to be established, not --

16 THE COURT: Will you give me some language?

17 MR. ROBERTSON: Can I give you some?

18 THE COURT: Yes. Will you do that?

19 MR. CARR: Your Honor, obviously, to
20 anticipate, it has to meet every claim, and that's in
21 the instructions. That's not going to their question.

22 THE COURT: Well, I think that --

23 MR. ROBERTSON: I think it's somewhere in
24 there where you described the Fisher RIMS system and
25 its features as of the relevant date would be the

1 pertinent inquiry.

2 As Your Honor knows, there were 40 iterations
3 at least. There were things they never implemented in
4 the '989 patent.

5 MR. CARR: Well, Your Honor, now
6 Mr. Robertson is arguing his case to you, and if I
7 could have an opportunity to respond, I would.

8 MR. ROBERTSON: I'm giving you the reasons
9 why I think something that's directed to what the
10 features are is the thing that the jury needs to
11 determine was sufficiently proven. Obviously, I don't
12 want my argument to go into the answer to this
13 question, but this has posed the exact problem we were
14 concerned about.

15 Obviously, this is a very thoughtful
16 question, Your Honor, by the jury because they are
17 struggling with and they are grappling with what this
18 means. Someone is thinking very clearly back there.

19 THE COURT: Lawson asserts that something
20 called Fisher RIMS is prior art for purposes of
21 anticipation and obviousness. Lawson must prove by
22 clear and convincing evidence what the Fisher RIMS
23 system was that it contends to be prior art by showing
24 that some version of Fisher RIMS had all of the
25 features and functionality of the claims at issue on a

1 claim by claim basis.

2 EPlus contends that Lawson has not met this
3 burden. It's for you to decide whether Lawson has
4 done that by clear and convincing evidence.

5 Will that do it for both of you?

6 MR. MERRITT: Your Honor, that's acceptable
7 to ePlus.

8 MR. CARR: Your Honor, you used two words,
9 something called Fisher RIMS, in the first line. That
10 would be the only part that I think ought to come out.

11 THE COURT: Why? That's the very problem
12 that was created by the evidence that you offered.
13 You never defined what it was.

14 MR. CARR: You're characterizing Fisher RIMS,
15 and you've gone on to say that they need to prove to
16 you the different elements. By using those two words
17 "something called" I think is prejudicial to Lawson.

18 THE COURT: Why? Because that's what you
19 have done. You've called it that.

20 MR. CARR: Again, Your Honor, I don't think
21 it's appropriate for instruction to the jury to
22 include that phrase because it tends to characterize
23 the evidence and tends to deliver the message that
24 there was nothing called Fisher RIMS. We disagree.

25 THE COURT: There wasn't, and I think I may

1 have erred in letting it go as a prior art reference
2 because there's so much about it that is unknown, and
3 I don't think Dr. Shamos ever stood tall and delivered
4 on it.

5 Here's the real problem that's created. It's
6 that your man, no matter what it is, your man Shamos
7 only based his opinion on invalidity only on the '989
8 patent. That's the fundamental problem here. And I
9 may have erred in letting it go to the jury.

10 Lawson asserts what it refers to as the
11 Fisher RIMS system. I'll do that.

12 MR. CARR: That's fine.

13 THE COURT: That takes care of the first one.

14 All right. Now, you were saying something,
15 Mr. Merritt, and I just interrupted you.

16 MR. MERRITT: Yes, sir. This is in
17 connection with both the J-CON/P.O. Writer combined
18 question and the P.O. Writer question. In our zeal to
19 clarify that, I think we should be careful not to
20 invite the Court into making an error as to what the
21 legal effect of that evidence is.

22 Jury instruction No. 42, which I don't think
23 is a terribly controversial instruction, correctly
24 states the law.

25 THE COURT: Just a minute. Let me get there.

1 MR. MERRITT: Yes, sir.

2 THE COURT: Okay. Just a second.

3 MR. MERRITT: Yes, sir.

4 THE COURT: Okay.

5 MR. MERRITT: However we clarify this with
6 the jury in whatever form, we shouldn't inadvertently
7 reverse this instruction. The purpose of this
8 evidence on long felt but unresolved need, which is
9 factor two, is that it indicates the invention would
10 not have been obvious, and we don't want to
11 inadvertently reverse that concept.

12 THE COURT: I agree. I absolutely agree, and
13 I had in mind marking 42 as the instruction that I
14 refer them to when answering this question.

15 MR. CARR: I think if you just refer them to
16 that instruction and maybe even to .2, that would be
17 fine.

18 MR. ROBERTSON: I just want to make clear
19 that it is not prior art for purposes of the verdict
20 form that they can consider invalidating --

21 THE COURT: Yes, that has to be answered in
22 the first part of the claim that it can't be
23 considered as prior art for the purposes of either
24 anticipation or obviousness. It was permitted into
25 the case only for them to consider in deciding what is

1 discussed in instruction No. 42 and the particular
2 paragraph two.

3 MR. MERRITT: And it may be helpful, Your
4 Honor --

5 THE COURT: And I'll read that all again.

6 MR. MERRITT: It may be helpful to tell the
7 jury the only items that you may consider for any
8 purpose are correctly set forth in your verdict form.
9 The question seems to imply there may have been an
10 inadvertent admission from the form and to say it
11 positively may also help that.

12 THE COURT: I think that's also in the
13 instructions.

14 Do you want to go check that transcript for
15 me?

16 MR. CARR: Yes, Your Honor.

17 THE COURT: What was the instruction on the
18 last one there, Mr. Merritt, again?

19 MR. CARR: 42?

20 THE COURT: No, I'm sorry, the last question.

21 MR. ROBERTSON: 31.

22 THE COURT: 31.

23 MR. ROBERTSON: Yes, there are two sentences
24 in there, Your Honor.

25 THE COURT: Right. I just need to make

1 myself a note.

2 MR. MERRITT: Your Honor --

3 THE COURT: Hold on. Let me just get there
4 and make sure I'm right about that.

5 MR. CARR: The only point, Your Honor, that I
6 made is that I think it would be helpful to them to
7 clarify that they just need to consider each of those
8 separately and not together.

9 THE COURT: What sentence were you talking
10 about?

11 MR. ROBERTSON: The second full paragraph,
12 second sentence, "To anticipate a claim, each and
13 every element in the claim must be present in a single
14 item of prior art."

15 Next sentence, "Anticipation cannot be
16 established by combining two or more items of prior
17 art."

18 THE COURT: Okay. Now, so we need to take a
19 recess now for you-all to go check that transcript.

20 MR. MERRITT: Mr. Honor, let me ask, given
21 the fact we seem to be in agreement on what works for
22 the J-CON and P.O. Writer, I think that was the
23 relevance of looking at Shamos.

24 So do we agree now?

25 MR. CARR: That's fine, Your Honor. I think

1 that's a good way to leave it.

2 THE COURT: All right. Let's get the jury
3 back in here.

4 THE CLERK: That question is Court Exhibit 5.

5 THE COURT: You haven't marked it, have you?

6 THE CLERK: No, sir. I wanted to check the
7 record first to make sure I'm correct.

8 (The jury is present.)

9 THE COURT: All right. Ladies and gentlemen,
10 first, your first question is: In section II,
11 validity (A) what are we supposed to use to define
12 "Fisher RIMS" in A?

13 Lawson asserts that what it refers to as the
14 Fisher RIMS system is prior art for purposes of
15 anticipation and obviousness. It appears in both
16 those places. Lawson must prove by clear and
17 convincing evidence what the Fisher RIMS system was
18 that it contends to be prior art by showing that some
19 version of Fisher RIMS had all the features and
20 functionality of the claims at issue on a claim by
21 claim basis. That's where we start.

22 Now, ePlus contends that Lawson hasn't met
23 that burden. That was their argument to you. Their
24 argument was they didn't show any version of Fisher
25 RIMS had the functionality of the claims at issue on a

1 claim by claim basis.

2 It is for you to decide whether Lawson has
3 met its burden by clear and convincing evidence. In
4 other words, you decide whether Lawson has proved what
5 I outlined for you. Does that help you?

6 THE JURY: Yes.

7 THE COURT: Okay.

8 The next question is: Since J-CON and P.O.
9 Writer aren't listed on our verdict sheet, are we to
10 consider them as prior art? Isn't that what they were
11 included in the case for? Was P.O. Writer meant to be
12 considered as a competing, similar system or was that
13 evidence not to be included in deliberations?

14 There really are two parts of that, and for
15 that I would like to refer you to instruction 30,
16 which lists prior art for purposes of anticipation,
17 and to instruction 39, which lists the prior art
18 that's at issue for obviousness.

19 You will note that neither J-CON or P.O.
20 Writer is listed as prior art either for purposes of
21 anticipation or for purposes of obviousness. That
22 means that you cannot consider either P.O. Writer or
23 J-CON or the combination thereof for purposes of
24 deciding anticipation or obviousness.

25 Are you with me so far?

1 THE JURY: Yes.

2 THE COURT: Now, you asked is that evidence
3 in the case still? That is, that there existed
4 something called J-CON and P.O. Writer. And the
5 answer to that is I refer you to instruction 42. 42,
6 I told you, has certain factors which, if established,
7 may indicate that the invention would not have been
8 obvious. In other words, these are things that show
9 non-obviousness. None of those factors alone is
10 dispositive and you must consider the obviousness or
11 non-obviousness of this invention as a whole.

12 But if you'll look at No. 2 in that list,
13 there are six things or seven things, I think, in that
14 list. Yes. No. 2 says, Was there a long felt but
15 unresolved need for a solution to the problem facing
16 the inventors? The inventors meaning of the '683, the
17 '516, and the '172 patents, which was satisfied by the
18 claimed invention. And the evidence about that there
19 is a J-CON and there is a P.O. Writer was admitted for
20 you to consider in deciding whether or not you think
21 there was a long felt but unresolved need for a
22 solution to the problem facing the inventors in this
23 case, which was satisfied by the claimed invention.
24 In other words, that evidence is related and admitted
25 only for the purpose for you to consider in deciding

1 the issue of non-obviousness as outlined in
2 instruction No. 42, which I can read it all over again
3 to you, but I think you can consider it yourselves
4 when you get back in the jury room.

5 I think we have now answered them as we
6 agreed; is that right, Mr. Robertson and Mr. Carr?

7 MR. CARR: Yes, Your Honor.

8 Do you have a second -- another question?

9 MR. ROBERTSON: Yes, Your Honor, I would like
10 to point out that all the factors need to be
11 considered --

12 THE COURT: All the what?

13 MR. ROBERTSON: All the factors need to be
14 considered under instruction 42 as you have given it.

15 THE COURT: Yes. I said I could read them
16 all, but they said they didn't want them read, they
17 could read them themselves.

18 MR. ROBERTSON: Understood. Thank you.

19 THE COURT: Now, in your last question, it
20 is, "In jury instructions, Judge Payne spoke of
21 anticipation: Two items combined are not prior art.
22 So anticipation does not apply anymore. Is this
23 correct?"

24 Let me refer to you instruction No. 31, which
25 deals with anticipation, and in the second paragraph

1 there, it says, To anticipate a claim, each and every
2 element in the claim must be present in a single item
3 of prior art. A single item of prior art.
4 Anticipation cannot be established by combining two or
5 more items of prior art.

6 So are you with me there?

7 THE JURY: Yes.

8 THE COURT: Now, I'll point out to you that,
9 I've told you before, that in deciding obviousness,
10 you can consider combinations of prior art, but in
11 anticipation, you can't. To anticipate, everything
12 has to be in one piece of prior art. Okay? Does that
13 answer your questions?

14 THE JURY: Yes.

15 THE COURT: Any objections to the answers?

16 MR. CARR: No, Your Honor.

17 MR. ROBERTSON: No, Your Honor.

18 THE COURT: All right. Thank you very much.
19 You-all may retire to deliberate your verdict.

20 (The jury resumes their deliberations at
21 11:34 a.m.)

22 THE COURT: I guess they are working their
23 way through things. Their lunches haven't come yet,
24 have they?

25 MR. LANGFORD: No.

1 THE COURT: Mr. Neal will tell you about
2 that. Thank you very much.

3 (Recess taken.)

4 (Court resumes at 2:15. The jury is not
5 present.)

6 THE COURT: Where is the question?

7 THE CLERK: I gave it to Ms. Haggard.

8 THE COURT: "Could we please have the trial
9 transcripts for Dr. Weaver, Dr. Shamos, Patrick
10 Niemeyer, and Brooks Hilliard?"

11 What do you think, gentlemen?

12 MR. CARR: I mentioned to Mr. Robertson
13 beforehand, it's fine with Lawson. It's up to the
14 judge whether you send transcripts back, but they've
15 asked for it, and they wanted it. And we think that's
16 what you ought to do, but we understand it's up to
17 you.

18 MR. ROBERTSON: We think, Your Honor, there's
19 a jury instruction on it with respect to the evidence.
20 And it's the jurors' recollections that should
21 control. We're going to get way down in the weeds if
22 we start trying to piece together all these
23 transcripts.

24 THE COURT: What?

25 MR. ROBERTSON: We think that they should

1 rely on their recollections of the witnesses
2 testimony.

3 THE COURT: Well, I told the jury in the
4 beginning we didn't have the transcripts to give to
5 them, didn't have the capacity to do that. The reason
6 for doing that is because in the past, we 've never
7 had the transcript to give them. And now even we
8 generally don't have daily transcripts.

9 And they know we have them now because, in
10 fact, both of you cited them in your closing
11 arguments. And I'm wondering why if the jury is
12 willing to look through all that and you-all haven't
13 taken exception to any of the transcripts, have you?
14 Anybody?

15 MR. CARR: As to their accuracy, do you mean?

16 THE COURT: Yes.

17 MR. CARR: No.

18 THE COURT: You haven't had any, have you,
19 Mr. Robertson?

20 MR. ROBERTSON: I did review some. There are
21 some inaccuracies, but we haven't had the time to
22 correct them. For example, at one point I asked
23 whether a customer had looked at something and it said
24 in the transcript whether the court had looked at
25 something. I just noticed that one discrepancy.

1 I think on the large part the court reporters
2 have done a remarkable job given how fast some of the
3 lawyers talk, myself not included, of course. But I
4 would think that they are largely, in large part, I
5 would not quibble with the accuracy, Your Honor.

6 That's not my objection.

7 THE COURT: Well, if they are willing to go
8 through and look at them.

9 MR. ROBERTSON: It's going to take us a
10 little time to assemble them, as you might expect,
11 Your Honor, because, for example, I think Dr. Weaver
12 testified over the course of three days. So this is
13 not something I can turn around in a few moments, but
14 we can do our best.

15 THE COURT: Let me ask you something. Can
16 the court reporters print out just parts of the
17 transcript?

18 THE COURT REPORTER: Judge, Peppy is not here
19 today and she has her part at home with her. I don't
20 have that here. They haven't been filed yet.

21 THE COURT: They haven't been filed yet?

22 THE COURT REPORTER: No, sir.

23 THE COURT: Do you all have other things to
24 do before you file them? Are these unedited versions
25 or what?

1 THE COURT REPORTER: We just haven't had time
2 to file them and they haven't been proofed.

3 MR. ROBERTSON: We're talking literally
4 several hundred pages.

5 THE COURT: What?

6 MR. ROBERTSON: We're talking literally
7 several hundred pages, Your Honor, for these four
8 individuals.

9 THE COURT: Yeah. I can imagine. They
10 talked -- Dr. Weaver was here for a day and a half,
11 wasn't he? And Dr. Shamos was here for about the same
12 period of time.

13 MR. CARR: He was split up.

14 THE COURT: He was split up, but if you added
15 it all together we're looking at probably a day plus
16 testimony.

17 MR. CARR: Yes, I think that's right.

18 THE COURT: And then Mr. Niemeyer was what,
19 about three or four hours. Three hours. Four hours.
20 And Mr. Hilliard was probably about the same, I think.
21 So I would imagine if you needed to, you could print
22 out just a part of the transcript?

23 THE COURT REPORTER: Yes.

24 THE COURT: But the court reporter who has
25 part of the transcript is not here today, and the only

1 way I know for her to do that is to segment it out and
2 then e-mail it to you.

3 See how technical I've became? It's absurd.
4 And email it to you. And then you could do that. But
5 that doesn't solve the problem that the transcript
6 hasn't been edited.

7 MR. CARR: It hasn't been proofed, I think,
8 is what --

9 THE COURT: I mean proofed. Excuse me.

10 MR. CARR: We'd be happy to edit it.

11 THE COURT: We don't usually do that. That's
12 a good point.

13 MR. MERRITT: Judge, the thought crosses my
14 mind, I don't know if this is the case or not, I
15 really wonder if this question is a proxy just for one
16 or two issues that they are really struggling about
17 that may be touched upon in these transcripts but fall
18 short of having to produce four transcripts wholesale.
19 I don't know if it's helpful for the Court to inquire
20 further about that or this just gets us further in the
21 weeds. But it just crosses my mind that maybe there
22 is some issue that these four people all addressed,
23 and somehow by seeing them lined up, they are able to
24 resolve that issue.

25 I don't know. I just raise it for the good

1 of the cause.

2 THE COURT: I had given some thought to that,
3 too, when I was told that they had asked the court
4 security officer for the transcripts. I said, Well,
5 go back and ask them what they want. And they came
6 back with this.

7 I think the original verbal request was for
8 the transcript, and they didn't say, as far as I knew,
9 from beginning to the end, and the depositions.

10 Didn't they ask for the depositions,
11 Mr. Langford?

12 MR. LANGFORD: Yes.

13 THE COURT: And the depositions are exhibits.
14 They just didn't go back to them, I believe. I
15 believe that we had talked about it previously, and I
16 think we said if they asked for them, we could give
17 them to them, but they didn't ask for them when I sent
18 him back.

19 Now, they have decided -- when I told them to
20 write down what they wanted so I could get it to you
21 all without having something slip between the cup and
22 the lip in the information sense, they just wanted the
23 trial transcripts for these four people. And we
24 haven't had those things proofed yet.

25 And I think you're probably right, that they

1 probably are focusing on some issue, but then the
2 question would come, Well, what's the testimony that
3 relates to that issue? And I think ePlus might have
4 one view of that and Lawson might have another view of
5 that. And so I would be inclined to give them the
6 whole and let them find what they wanted if I were
7 going to do anything.

8 MR. ROBERTSON: I am concerned, Your Honor,
9 they have not been proofed yet. I have gone through
10 some of them and there are just --

11 THE COURT: I can say this. Just by looking
12 at Ms. Daffron's face, I think she was concerned
13 whether they are proofed, too.

14 I think that what I've seen of the
15 transcripts, I've really not seen much by the way of
16 error, or any error, but I've only seen what you-all
17 have used in your closing arguments.

18 MR. CARR: We can certainly tell them that
19 they have not been proofed.

20 THE COURT: Yes. In part, I wonder whether
21 the problem could be solved by asking them whether
22 what they really want is the part used in closing
23 arguments.

24 MR. CARR: Perhaps we put in a little from
25 each of these witnesses in closings, but in general I

1 think most of what was quoted in closings was not from
2 these four.

3 THE COURT: Yeah, I think you're right
4 actually. The more I think about that, I think you're
5 right, Mr. Carr. While there were transcripts used,
6 it wasn't from these four. Dr. Shamos was three or
7 four times by Mr. Robertson, and I think Mr. Weaver
8 was a couple times by Mr. McDonald. Your point is
9 well taken.

10 Well, I think what I'll do is tell them the
11 transcripts haven't been proofed yet in their entirety
12 and they have to rely upon their memories of what the
13 witnesses said given that they haven't been proofed.
14 I don't know what else to do.

15 Does it concern you that they haven't been
16 proofed, Mr. Carr?

17 MR. CARR: It does not.

18 THE COURT: I'll have to say that what I've
19 seen of them doesn't indicate there's anything much
20 that would be served by proofing. But to say that is
21 a major jump because it's very little that I've read
22 in my legal career that didn't improve by being
23 proofed.

24 Is this the original question that you gave
25 me? All right.

1 I'll say the transcripts have been prepared,
2 but they have not been proofread in their entirety,
3 and, therefore, you will need to rely on your
4 recollection of the testimony.

5 Is that satisfactory?

6 MR. ROBERTSON: Your Honor, in all candor,
7 Your Honor, I don't know if there is any right answer
8 to this, but that is satisfactory. I'm almost in
9 perfect equipoise on this, but I am concerned about
10 the transcripts going back there not proofed. So I
11 think I'm in agreement with you and would not object
12 to that instruction.

13 MR. CARR: That answer is fine from Lawson's
14 standpoint if that's your decision that they should
15 not have them.

16 THE COURT: The comment is fine. You'd
17 prefer they have the transcript?

18 MR. CARR: Exactly.

19 THE COURT: I think the record is clear on
20 that. But I think it's wise to make it clear.

21 MR. CARR: That's right.

22 THE COURT: Here is the question.

23 THE CLERK: The answer will be 7, the
24 question is 6.

25 THE COURT: Okay. Does that take care of

1 everything so far? Put a copy of that back up here so
2 I'll have it in case we need it.

3 MR. CARR: Judge?

4 THE COURT: Yes.

5 MR. CARR: This does not need to go on the
6 record. This is a point of personal preference.

7 (Off the record discussion.)

8 (Recess taken.)

9 (Court resumes session at 5:30 p.m. The jury
10 is present.)

11 THE COURT: All right. Ladies and gentlemen,
12 you are through for the day and will come back
13 tomorrow. When do you want to come back? Is 9
14 o'clock all right?

15 THE JURY: Yes.

16 THE COURT: We'll see you at 9 o'clock
17 tomorrow. Do you want your lunch brought to you or do
18 you want to get out of confinement? You didn't
19 realize that serving on a jury is sort of like being
20 on lockdown, did you? Because if you want lunch,
21 we'll have it brought to you, but if you want to get
22 out and go on your own --

23 THE JURY: We can just bring lunch in.

24 THE COURT: You want us to bring lunch?

25 THE JURY: Yes, please.

1 THE COURT: All right. We'll do it. As hard
2 as you-all work, what we're asking you to do, that's
3 the least we can do for you.

4 Thank you. Drive carefully. Mr. Neal will
5 take care of your notebooks. In fact, he'll just lock
6 the room up so you don't have to move things.

7 (The jury is leaving for the evening to
8 return tomorrow at 9:00.)

9 THE COURT: Do you feel lonely, Mr. Carr?

10 MR. CARR: I've got my little room in the
11 hallway. People come by and see me in there and come
12 talk to me.

13 THE COURT: You can get some billable hours.
14 We don't need to be on record for this.

15 (Off-the-record discussion.)

16 THE COURT: See you in the morning at nine.

17 (The proceedings were adjourned at 5:32 p.m.)

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